MAR 15 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1261

DETROIT TYPOGRAPHICAL UNION NO. 18,
INTERNATIONAL TYPOGRAPHICAL UNION,
Petitioner,

v.

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION,
THE DETROIT NEWS, and THE DETROIT FREE PRESS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutory provisions involved	3
Statement of the case	4
Reasons for granting the writ	10
1. The Sixth Circuit's decision casts doubt and confusion over the enforceability of an important and widely-used collective bargaining clause	11
2. The Sixth Circuit's ruling that federal courts lack power to construe or enforce status quo clauses conflicts with decisions of this Court	14
3. The Sixth Circuit's ruling that the status quo clause is enforceable only on proof of a high degree of irreparable harm is both confusing and inconsistent with this Court's decisions	17
4. This case will not be rendered moot on the rendition of the arbitrator's decision as to the merits of the underlying contract dispute	22
Conclusion	23
Appendix (judgment and opinions below)	1a

CITATIONS

Cases:

American Radiator & Standard Sanitary Corp. v. Local 7, 358 F.2d 455 (C.A. 6, 1966)	14
Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962)	15
Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970)	10, 11, 14, 15, 16, 17, 19, 20
Brotherhood of Locomotive Engineers v. M.-K.-T.R. Co., 363 U.S. 528 (1960)	13

Page

Drake Bakeries v. Bakery Workers, 370 U.S. 254 (1962) 19
Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (C.A. 2, 1972) 13
Moore v. Ogilvie, 394 U.S. 814 (1969) 22
Operating Engineers v. Flair Builders, Inc., 406 U.S. 487 (1972) 15
Pittsburgh Newspaper Printing Pressmen's Union No. 9, et al. v. Pittsburgh Press Co., C.A. 3, Nos. 72-1495 and 72-1496 12
Printing Pressmen v. Pittsburgh Press Co., 343 F.Supp. 55, 81 LRRM 2436 (W.D. Pa. 1972) 12
Roe v. Wade, No. 70-18, Jan. 22, 1973 22
Steelworkers Trilogy, 363 U.S. 564 (1960) 14, 15, 16, 20, 21
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 14, 15, 16, 20, 21

STATUTES AND MISCELLANEOUS:

Labor-Management Relations Act, § 301(a) 4

Norris-LaGuardia Act, § 7 3

Department of Labor, Collective Bargaining Agreement Grievance Procedures, Bulletin No. 1425-1 (November 1964) 12

2 Pomeroy, Equity Jurisprudence (5th ed. 1941) 13

1 Story, Equity Jurisprudence (14th ed. 1918) 13

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The petitioner, Detroit Typographical Union No. 18, International Typographical Union, hereby requests the issuance of an order granting certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 20, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, dated December 20, 1972, has not yet been reported. It is reprinted in the Appendix hereto, p. 1a, *infra*.

The United States District Court for the Eastern District of Michigan rendered an oral and unreported opinion on November 14, 1972. It is reprinted in the Appendix hereto, p. 16a, *infra*.

JURISDICTION

The petitioner union filed a complaint under Title III, § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, seeking an injunction restraining the respondents from utilizing certain electronic editing equipment in alleged violation of a so-called "status quo" clause in the collective bargaining agreement. The District Court granted a preliminary injunction on November 14, 1972. On appeal, the Sixth Circuit reversed the order granting the injunction on December 20, 1972. This petition for writ of certiorari has been filed within 90 days from the entry of the Sixth Circuit's judgment of December 20, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in an action brought under § 301(a) of the Labor-Management Relations Act, a federal court has the prerogative or the power to construe and to enforce a provision of a collective bargaining agreement obligating the parties to maintain the status quo as to wages, hours and working conditions pending arbitration of a contract dispute as to such matters.

2. Whether the construction and applicability of such a status quo provision must be submitted to arbitration along with the basic underlying dispute.

3. Whether, if a federal court has any prerogative or power to enforce a status quo clause, the court must balance the equities between the parties and find severe and irreparable economic injury as prerequisites to ordering enforcement of the clause, or whether a proved violation of the clause alone constitutes sufficient irreparable injury to justify enforcement.

4. Whether the procedural requirements of § 7 of the Norris-LaGuardia Act apply to an action under § 301 (a) of the Labor-Management Relations Act to secure enforcement of a status quo clause pending arbitration of the basic underlying dispute.

STATUTORY PROVISIONS INVOLVED

Section 7 of Norris-LaGuardia Act, 29 U.S.C. § 107:

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or

persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

* * * * * * * * * * *

Section 301(a) of Labor-Management Relations Act, 29 U.S.C. §185(a):

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

This controversy involves the enforceability by injunction, in an action under § 301(a) of the Labor-Management Relations Act, of a so-called "status quo" clause. That clause, which appears in the current col-

lective bargaining agreement between the parties to this case,[1] provides quite clearly that

> "When a difference arises as to the interpretation and application of any provision of this Agreement, the wages, hours and working conditions prevailing prior to the change out of which the difference arose, shall be preserved unchanged pending decision by the Joint Standing Committee [or by the arbitrator should the Committee fail to resolve the dispute]." See p. 10a, *infra*.

The dispute as to the enforceability of that clause had its genesis on September 26, 1972. On that date the Detroit News, one of the respondents herein, embarked on a program of installing and utilizing electronic editing equipment known as a CRT. Computer input and/or tapes are prepared on the CRT, resulting in an automatic typesetting of news articles in the newspaper. This equipment was to be operated by editorial employees rather than by composing room employees or printers, represented by the petitioner union. When the union learned of this program it informed the Detroit News management that it would consider the use of this equipment on anything other than a testing basis as a violation of the current collective bargaining agreement between the parties, unless the equipment were operated by composing room employees. The union's position was that Sections 47 and 48 of the agreement require that the equipment be operated only by composing room employees. See pp. 12a-13a, *infra*.

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[1] The parties to the agreement are the petitioner Detroit Typographical Union No. 18 and the respondent Detroit Newspaper Publishers Association, which for bargaining purposes represents the respondent Detroit News and the respondent Detroit Free Press.

This CRT equipment was designed to replace an older teletypesetter operation (TTS) that had been manned by composing room employees known as tape punchers. Approximately 80 tape punchers, represented by the petitioner union, are employed by the News.

It was the union's position that the new CRT equipment should be operated by the tape punchers. The first test tapes on the new equipment were run by editorial employees on September 26, 1972. On October 2, 1972, the News formally acknowledged that a dispute existed over the operation of the CRT equipment and submitted that dispute to the joint standing committee in accordance with the agreement.[2] That committee was unable to resolve the dispute and the matter was thereupon submitted to arbitration pursuant to the agreement. See pp. 3a, 17a, *infra*. There the dispute now rests. The impartial arbitrator heard testimony and oral arguments on January 18 and 19, 1973, and is presently awaiting submission of briefs by the parties. The decision of the arbitrator is obviously some months in the future.

The first test tapes on the CRT equipment were run by editorial employees on September 26, 1972, and the first tapes for live publication of newspapers were run

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[2] As formulated in the Detroit News letter of October 2, 1972, the dispute to be submitted to the joint standing committee read as follows: "Would it be a violation of the Collective Bargaining Agreement for The Detroit News to utilize electronic editing equipment without having to assign ITU members to duplicate work being performed by the electronic editing equipment or by employees in the News' editorial department?" Tr. 131. The correctness or completeness of that formulation of the dispute is not here relevant.

on October 30, 1972. Tr. 89. The union immediately protested by telegram on the latter date that such use of the tape "is a violation of Section 10(b) 'status quo' and you are required to cease the use of such tape and/or computer input until this dispute is resolved under the terms of the agreement." Tr. 134. The News responded that "since we do not believe that the status quo clause is applicable, we will not accede to your request to cease the utilization of such equipment," and that "we are, of course, ready to resolve the dispute regarding applicability of the status quo clause through the appropriate [arbitration] procedure." Tr. 132.

Thus by its actions on October 30, 1972, and subsequently, the News unilaterally effectuated a change in work conditions of those composing room employees who had been operating the older computer equipment known as TTS. From that day forward, all computer operations have been performed on the new CRT equipment by editorial employees.

On October 31, 1972, the union filed its verified complaint in the District Court, seeking a temporary and a permanent injunction against such unilateral use of editorial room employees in operating the CRT equipment pending arbitration. The District Court's jurisdiction thus to compel adherence to the status quo provision was invoked under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185.

At the evidentiary hearing in the District Court it was revealed that the News intended to install additional CRT equipment and to insist that it be operated only by editorial employees. Three CRT machines were

in operation in the editorial room at the time of the hearing. It was estimated that thirty-six machines would be in operation by January of 1973 and sixty-two by April or May of 1973. Tr. 49, 86. A representative of the News testified that no union member would be laid off as a result of the installation of this CRT equipment, although changes in work conditions would occur for about 25 of the 500 composing room employees of the News. Tr. 77, 79, 85. It was conceded, moreover, that the CRT operation by non-bargaining unit employees would result in a substantial loss in overtime opportunities and earnings for the tape punchers who had been operating the older TTS equipment. Tr. 79-80.

On November 14, 1972, following this hearing, the District Court issued a preliminary injunction specifically enforcing the status quo provision, pending arbitration of the underlying dispute.[3] In the accompanying opinion (see p. 16a, *infra*) the District Court set forth several considerations thought to justify the injunction:

(1) The language of the status quo provision is clear and demands that the conditions which existed before the dispute must be maintained until the dispute is resolved.

(2) To have any meaning at all, the status quo provision must be read apart from the provision requiring

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[3] The injunction restrained the respondents "from using electronic editing equipment for preparing or producing computer input and/or tapes for live publication unless the computer input and/or tapes are prepared and produced by composing room employees, or unless such computer input and/or tapes are used for test purposes only . . . until determination of the dispute presently pending before the arbitrator." See p. 19a, *infra*.

that all disputes arising out of the operation of the agreement be referred to the joint standing committee. To read it otherwise, as the respondents would do, would render the status quo provision a nullity. Thus rejected was the respondents' argument that because they disputed the applicability of the status quo provision, on the ground that there had been no change in working conditions within the meaning thereof, the applicability of the status quo clause must also be submitted to arbitration.

(3) The status quo had in fact been upset in such a way as to justify intervention by the court. Prior to the installation of the CRT equipment, all computer input and/or tapes were prepared by composing room employees. But that has all been changed, the tapes involved in the CRT equipment being prepared now by editorial employees. And to allow the respondents "to continue to expand their program while the issue is being arbitrated would do violence to the letter and spirit of the collective bargaining agreement." It was to protect against "such irreparable injury" that the District Court determined to issue a preliminary injunction. See p. 19a, *infra*.

The Sixth Circuit reversed. First, it held that it was not the prerogative of the District Court to construe the status quo provision, or to make a factual determination as to its violation, and that the whole status quo matter ought to be determined by arbitration along with the basic underlying dispute between the parties. Secondly, the Sixth Circuit held that in any event the District Court had erred in failing to weigh the equities between the parties and in failing to insist upon a showing of irreparable harm to employees before issuing an injunction, requirements said to be mandated

by *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970). In that connection the Sixth Circuit stated that the fact "that this case involves an injunction against the employer does not mean that the District Court was free to ignore the procedural mandates set forth in §7 of the Norris-LaGuardia Act or to grant an injunction in the absence of irreparable harm." See p. 7a, *infra*.

The Sixth Circuit's reversal of the injunction order was stated to be "without prejudice to any future proceeding that may be instituted seeking an injunction to restrain the Detroit News from terminating any employee as a result of the utilization of the electronic editing equipment pending the arbitrator's determination as to the applicability of the 'status quo' clause and the right of the newspaper to utilize this equipment." See p. 9a, *infra*.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit has rendered totally impotent all collectively bargained clauses seeking to maintain the status quo as to wages, hours and working conditions, pending arbitration of a dispute over a change in those wages, hours or conditions. It has done so by an analysis explicitly rejected by this Court in a line of cases culminating in *Boys Markets*, which dealt with parallel problems as to no-strike clauses.

First, the Sixth Circuit has ruled that federal courts lack the "prerogative" under § 301 of the Labor-Management Relations Act to construe status quo clauses or to determine whether they have been violated. Such clauses must be arbitrated, the court has ruled, and thus cannot be specifically enforced prior to arbitration.

Second, on the inconsistent assumption that status quo clauses are judicially enforceable prior to arbitration, the Sixth Circuit has proclaimed that enforcement must be predicated upon a balancing of the equities and upon a showing of some injury more irreparable than proof of a unilateral work change in violation of the status quo clause. And even then, apparently only the arbitrator can resolve the applicability of the status quo clause to the pre-arbitration period.

These rulings, in the context of the oft-litigated §301, raise important matters of federal labor law and policy. And the importance of these rulings is highlighted by the fact that status quo clauses are a widely used means of aiding and supplementing the arbitration process, described by this Court as the central institution in the administration of collective bargaining contracts. See *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235, 252 (1970).

Because the two rulings of the Sixth Circuit, considered separately or as a confusing combination, are so inconsistent with the federal policy favoring enforcement of arbitration agreements and with this Court's decisions implementing that policy, certiorari should be granted.

1. The Sixth Circuit's decision casts doubt and confusion over the enforceability of an important and widely-used collective bargaining clause.

The status quo clause appears in many collective bargaining agreements other than the one between the instant parties. In the printing industry alone, the International Typographical Union records indicate that the clause appears in 19 of the 21 major city newspaper agreements, and that it also appears in more than

half of the other 2000-plus printing industry contracts throughout the United States. The enforceability of the clause in the printing industry has given rise to other litigation, as witnessed by the pendency before the Third Circuit of the identical enforceability issue in *Pittsburgh Newspaper Printing Pressmen's Union No. 9, et al.* v. *Pittsburgh Press Co.,* Nos. 72-1495 and 72-1496. Those appeals stem from a lower court denial of a preliminary injunction enforcing the status quo clause. *Printing Pressmen* v. *Pittsburgh Press Co.,* 343 F.Supp. 55, 81 LRRM 2436 (W.D. Pa. 1972). Already the Third Circuit, pending the appeals, has restored a lower court restraining order enforcing the clause (see 81 LRRM 2438, 2439). That temporary relief is precisely the kind of enforcement order the Sixth Circuit has held to be beyond federal court prerogative. Should enforcement ultimately be decreed on the appeals, to be argued early in April 1973, such a determination by the Third Circuit would directly conflict with the Sixth Circuit's ruling in the instant case.

Moreover, a study by the United States Department of Labor of significant collective bargaining agreements throughout the United States has revealed the existence of status quo provisions in agreements covering such diverse workers as electricians, machinists, photoengravers, teamsters, copper workers and independent industrial workers.[4] Thus the enforceability of all these status quo provisions in a wide variety of industry contracts is directly affected and indeed threatened by the Sixth Circuit's confusing decision.

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[4] Department of Labor, Collective Bargaining Agreement Grievance Procedures, Bulletin No. 1425-1, pp. 46-47 (November 1964). This report surveyed agreements that covered 1,000 or more workers. The exact number of agreements including a status quo provision was not given.

Even apart from specific status quo clauses, the importance of being able to maintain the status quo pending arbitration has often been recognized by federal courts.[5] In proceedings under the Railway Labor Act, this Court has commented that maintenance of the status quo "traditionally may be made the price of relief when the injunctive powers of the court are involved and the conditions are necessary to do justice between the parties." *Brotherhood of Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528, 531-532 (1960). Indeed, maintenance of the status quo is an historic equitable device used to preserve conditions giving rise to a dispute, pending litigation or arbitration of the dispute itself. See 2 Pomeroy, Equity Jurisprudence 51, 57-59 (5th ed. 1941); 1 Story, Equity Jurisprudence §§ 69-76 (14th ed. 1918). It gives the decision-maker the opportunity to resolve disputes in their incipient stage, unencumbered by the complications that can flow from a *fait accompli*. Maintenance of the status quo thus aids and eases the arbitration process.

Whether expressed in contract language or utilized as an equitable condition to an injunction, maintenance of the status quo is an important ingredient of federal labor and federal equity jurisprudence. The Sixth Circuit's strange refusal to recognize the judicial enforceability of a status quo requirement, quite apart from the court's inconsistent erection of high hurdles to judicial enforcement, makes a dangerous precedent in both the fields of labor law and equity.

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[5] The Second Circuit, in a case where no specific status quo clause was present, recently noted that in proper cases "the only way to preserve the *status quo* during the pendency of the arbitration proceeding is by the granting of injunctive relief." *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (C.A. 2, 1972).

2. The Sixth Circuit's ruling that federal courts lack power to construe or enforce status quo clauses conflicts with decisions of this Court.

The central and decisive holding of the Sixth Circuit appears to be that "It was not the prerogative of the District Court to construe the 'status quo' clause of the contract or to make a factual determination as to whether there has been a violation of this clause." The Sixth Circuit was unable to see any reason "why this issue, along with the basic underlying dispute between the parties, cannot be determined by arbitration." See p. 5a, *infra.*

In other words, the status quo clause has been likened to an ordinary provision of a collective bargaining agreement that calls for arbitration of any dispute over interpretation or application.[6] Such a reading of the status quo clause misconceives its true nature and is destructive of the established notions, epitomized by *Lincoln Mills* and *Boys Markets*, as to the enforceability of the arbitration process.

(1) By any definition, a status quo clause is ancillary to and thus an integral part of the agreement to submit contract disputes to arbitration. In this case, it is the arbitration agreement itself, Section 10(b),

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[6] In support of its view of the arbitrable nature of the status quo clause, the Sixth Circuit cited its own prior decision in *American Radiator & Standard Sanitary Corp.* v. *Local 7*, 358 F.2d 455, 458 (C.A. 6, 1966). But that case did not involve the arbitrability of a status quo clause. At issue was a dispute over whether management had created new jobs within the meaning of a management prerogative clause of the contract that was outside the scope of the arbitration obligation. That dispute, being factual in nature, was held to be resolvable only by the arbitrator, not the courts. The *American Radiator* decision was thus a correct application of the principles established in the *Warrior & Gulf* part of the *Steelworkers Trilogy*, 363 U.S. 574 (1960), which likewise did not deal with the enforceability of a status quo clause.

that provides *inter alia* for maintenance of the status quo and for "no interruption" in work pending the results of arbitration. In a real sense, therefore, the union has agreed not to strike or otherwise interrupt work as the *quid pro quo* for the publisher's agreement to arbitrate and to preserve the status quo pending arbitration.

(2) This Court has consistently held that the basic components of the arbitration *quid pro quo*, i.e., the no-strike agreement and the promise to arbitrate, are subject to enforcement and application by federal courts in § 301 proceedings prior to arbitration. Thus in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 451 (1957), federal courts were told "that the agreement to arbitrate grievance disputes . . . should be specifically enforced." And the *Steelworkers Trilogy*, 363 U.S. 564 at 582 (1960), again emphasized that § 301 had assigned the federal courts "the duty of determining whether the reluctant party has breached his promise to arbitrate." Making that determination, of course, requires a court to interpret the arbitration obligation and then act "on the basis of the contract entered into by the parties." *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); *Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487, 491 (1972).

The other side of the *quid pro quo*, the no-strike obligation pending arbitration, also falls within the power of federal courts under § 301 to interpret and apply and enforce. *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 253-254 (1970). The Court there sanctioned enforcement of a no-strike clause that, by the judicial process of interpreting the clause and assessing the facts, had been found breached. And the Court emphasized that no injunction could issue unless it was first found that the strike was over a grievance

that was subject to arbitration under the contract. 398 U.S. at 254. *Boys Markets* thus provides a method of enforcing a *quid pro quo* obligation that directly contradicts the judicial impotence decreed as to status quo clauses by the Sixth Circuit.

(3) Thus if the status quo clause be read as an integral part of the arbitration *quid pro quo,* the Sixth Circuit's decision cannot be squared with *Lincoln Mills, Steelworkers Trilogy* or *Boys Markets.* Federal courts would appear to be under a mandate from § 301 to interpret such a status quo clause and to determine whether it has been breached; if breached, the clause should be ordered enforced. The ruling of the Sixth Circuit that such matters are outside the "prerogative" of the federal courts is not only wrong as applied to the status quo clause but serves to weaken the judicial power under § 301 to enforce any and all aspects of the pre-arbitration *quid pro quo.*

(4) The Sixth Circuit has done more than undercut the judicial enforceability of the *quid pro quo* obligations. It has also rendered one of those obligations, the status quo promise, completely meaningless and ineffectual. The status quo clause relates only to the pre-arbitration period, precluding unilateral changes in working conditions during the period until arbitration of the underlying contract dispute can be had. But postponing any consideration of the status quo obligation until the arbitration (a) makes it impossible to enforce the obligation during the pre-arbitration period, and (b) moots the obligation, which in any event ends with the arbitrator's decision on the merits of the underlying dispute. As the District Court below remarked (see p. 18a, *infra*):

> ". . . for the status quo provision to have any meaning at all, it must be read apart from the

provision requiring that all disputes arising out of the operation of the agreement be referred to the joint standing committee. To read it otherwise would render the provision a nullity, particularly when the arbitration process drags on, as it often does, for months."

(5) In sum, the Sixth Circuit has made it impossible to enforce the *quid pro quo* obligation to maintain the status quo during the pre-arbitration period. That ruling has wide implications, both practically and legally. It places a premium on unilateral work changes, pending arbitration, despite a negotiated promise to the contrary. And it renders federal courts helpless to enforce the type of obligation heretofore mandated in § 301 proceedings. Such a ruling should be reviewed by this Court.

The *Boys Markets* opinion twice noted that employers "will be wary of assuming obligations to arbitrate specifically enforceable against them when no similarly efficacious remedy is available to enforce the concomitant undertaking of the union to refrain from striking." 398 U.S. at 248, 252. By the same token, unions will be wary of assuming an obligation to withhold strike action pending arbitration if the employer is free, under the Sixth Circuit's ruling, to violate and ignore the concomitant obligation to maintain the status quo as to working conditions pending arbitration.

3. The Sixth Circuit's ruling that the status quo clause is enforceable only on proof of a high degree of irreparable injury is both confusing and inconsistent with this Court's decisions.

The Sixth Circuit's decision in this case is overtly confusing and internally inconsistent. Having determined that the District Court lacked any "prerogative" to construe or enforce the status quo clause, the Sixth

Circuit in its next breath finds that "we do not hold that an injunction could never issue under a 'status quo' provision" but merely that "the injunction was not issued properly under the facts of this case, where the necessary prerequisites have not been met." See p. 9a, *infra*. Indeed, the opinion closes with an invitation to petitioner to renew its injunctive request if any employee is ever discharged as the result of the installation of the new CRT equipment, such injunction to be effective "pending the arbitrator's determination as to the applicability of the 'status quo' clause and the right of the newspaper to utilize this equipment." See p. 9a, *infra*.

What, then, does the Sixth Circuit's opinion really mean? Was the court serious when it said, without qualification, that federal courts have no "prerogative" to enforce the status quo clause and must leave that entire matter to arbitration? If so, how can they retain sufficient "prerogative" to compel obedience to the clause where certain prerequisites are met? And even if the courts retain that limited "prerogative," at least where employees have been discharged, how can the courts effectively exercise that "prerogative" if the applicability of the status quo clause remains totally subject to the arbitrator's subsequent determination?[7]

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[7] A judicial restraint on such a discharge would appear to turn upon the court's ability to construe and apply the status quo clause. Yet the last sentence of the opinion below states that such an injunction could be effective only "pending the arbitrator's determination as to the applicability of the 'status quo clause'." Does that mean that the applicability of the status quo clause is to be determined first by the court and then by the arbitrator? What effect would a judicial determination as to applicability have on the arbitrator's function of determining applicability?

Such a thicket of confusion fully justifies the grant of certiorari, if for no other reason than to clarify these important areas of federal court jurisdiction and national labor policy. But even apart from the inconsistencies, additional reasons for the grant of certiorari arise out of the Sixth Circuit's notions of what "prerequisites" are necessary to invoke whatever "prerogative" a federal court may have to enforce a status quo clause.

(1) The Sixth Circuit has read this Court's *Boys Markets* decision as requiring a federal court to "weigh the equities between the parties" as a basis for enforcing or denying enforcement of the status quo clause. See p. 5a, *infra*. But *Boys Markets* dealt with the enforcement not of a status quo clause but of a no-strike agreement pending arbitration. And this Court's formulation of the need for balancing equities was confined to the situation where the employer seeks "injunctive relief against concerted activity" in the form of a strike. 398 U.S. at 254. Query whether such a balancing is relevant in the context of the status quo clause, where a violation does not involve a "concerted activity" and where the parties may themselves have balanced the equities beforehand in negotiating the status quo clause. This may well be a situation where the *quid pro quo* elements are not to be regarded as "exact counterweights in every industrial setting," to be wrenched from context. *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254, 261, n. 7 (1962). What may be a prerequisite for a no-strike injunction may not necessarily be a prerequisite for a status quo injunction.

(2) The Sixth Circuit has also read *Boys Markets* as mandating "a showing of irreparable harm to em-

ployees" as a prerequisite to judicial enforcement of the status quo clause. See p. 5a, *infra*. But since *Boys Markets* dealt only with the strike situation, it may be doubted that the degree of irreparable harm that an employer must show in order to obtain a strike injunction is the same or as low as the irreparable injury necessary to a union's efforts to enforce the status quo obligation. Certainly nothing in *Lincoln Mills* or the *Steelworkers Trilogy* indicates that the enforceability of the agreement to arbitrate is dependent upon a showing of irreparable economic injury or loss of employment. A violation of the agreement to arbitrate carries with it its own intrinsic irreparable injury, an injury to the letter and spirit of the collective bargaining agreement and to the national labor policy favoring arbitration in accordance with the parties' agreement. The same implicit injury occurs, as the District Court here recognized (p. 19a, *infra*), when the employer violates the status quo clause by unilaterally imposing work changes. Like the agreement to arbitrate, the ancillary agreement to maintain the status quo should be enforceable upon proof of a violation, even where no loss of employment or other severe economic injury has resulted. Neither the promise to arbitrate nor the promise to maintain the status quo can be said to be limited to those situations where severe economic injury has ensued.

(3) Finally, the Sixth Circuit has here raised the specter of the applicability of Norris-LaGuardia Act standards for injunctive relief to § 301 proceedings. While perhaps unnecessary to its decision, the court suddenly states in the midst of its opinion (p. 7a, *infra*) that the District Court was not "free to ignore the procedural mandates set forth in § 7 of the Norris-

LaGuardia Act or to grant an injunction in the absence of irreparable harm." Such a statement cannot be allowed to go unchallenged by this Court, for it can cause untold and unnecessary complications in future injunctive actions under § 301. Lower courts need to be reminded that *Lincoln Mills* long ago rejected any such suggestion that the stiff procedural requirements of § 7 of the Norris-LaGuardia Act apply to § 301 efforts to enforce any aspect of the arbitration obligation. "The failure to arbitrate was not a part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed." 353 U.S. 458. And the *Boys Markets* decision fully confirms the *Lincoln Mills* rejection of § 7 of that Act, basing the no-strike injunctive prerequisites on common law equitable concepts.

In short, this case gives this Court the opportunity to determine what degree of irreparable injury, if any, is necessary to justify enforcement of a status quo clause pending arbitration. What are the equities to be balanced, if any? These problems can be resolved on a record where the District Court has found that the status quo clause itself is clear and unambiguous and that the employer has in fact violated that clause by its unilateral work change prior to arbitration.[8]

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[8] The respondents have not challenged the fact that a work change has been unilaterally imposed prior to arbitration. They have protested the applicability of the status quo clause, but only on the ground that the work change is justified under the contract. That is a bootstrap argument. The applicability of the status quo clause is not dependent upon the ultimate correctness of the employer's unilateral action. The clause, as interpreted by the District Court, absolutely bans all work changes pending arbitration, without regard to the decision of the arbitrator as to the propriety of the changes themselves.

4. This case will not be rendered moot on the rendition of the arbitrator's decision as to the merits of the underlying contract dispute.

The decision of the arbitrator as to the contract justification for the work change decreed by the Detroit News, while not expected for some months following the filing of this petition for certiorari, will undoubtedly be forthcoming before this Court can hear and determine the questions herein presented, should certiorari be granted.[9]

But the rendition of the arbitrator's decision will not moot the present controversy. Arbitration by its very nature is short-lived and rarely if ever exceeds the completion of the usual appellate process Moreover, the issue as to the enforceability of the status quo clause, while confined to the very short pre-arbitration period, is capable of repetition under this and all other collective bargaining contracts containing such clauses. Whenever an employer mandates a unilateral work change prior to arbitration, the issue will arise.

As was true with respect to the pregnancy period involved in the Court's recent abortion decision, *Roe* v. *Wade*, No. 70-18, Jan. 22, 1973, the shortness of the pre-arbitration period and the recurring nature of the problem arising therefrom combine to create "a classic justification for a conclusion of nonmootness." Any other conclusion would effectively deny appellate

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[9] It should be noted, however, that by agreement of the parties the issue as to the applicability of the status quo clause has not been submitted to the arbitrator. The necessity and propriety of such a submission, as contemplated by the Sixth Circuit, are questioned in the instant petition.

review of the important questions here involved. See also *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969).

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

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